88-1661

Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

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RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

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ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

I

WHETHER, UNDER OREGON V. ELSTAD, 470 U.S. 298 (1985), A SUBSEQUENT, VOLUNTARY, WARNED STATEMENT MAY BE RENDERED INADMISSIBLE BY THE "FRUIT OF THE POISONED TREE" DOCTRINE, MERELY BECAUSE A PRIOR IN-CUSTODY STATEMENT WAS GIVEN WITHOUT BENEFIT OF THE MIRANDA WARNINGS?

II

WHETHER, IF THE RULE OF ELSTAD RENDERS DEFENDANT'S SUBSEQUENT CONFESSION ADMISSIBLE, IT WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT, CHAPMAN V. CALIFORNIA, 386 U.S. 18 (1967) TO ADMIT HIS PRIOR, UNWARNED CUSTODIAL STATEMENTS DURING THE STATE'S CASE IN CHIEF?

## LIST OF PARTIES

Parties to the proceedings below, from the date of their inception, were the habeas corpus Respondent, Herman Solem, at the time, Warden of the South Dakota State Penitentiary, and the habeas corpus Petitioner, Steven Satter, an inmate at the Penitentiary. Petitioner Rist has been substituted as a party in this court, as Warden Solem retired effective March 17, 1989. Acting Warden Rist is now the custodian of Respondent Satter. See Rules of this Court, Rules 40.3, 40.4.

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PETITION FOR A WRIT OF CERTIORARI
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The Petitioner Richard Rist, Acting Warden, South Dakota Penitentiary, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of South

Dakota, entered in the above-entitled proceeding on January 4, 1989.

## OPINIONS BELOW

The opinion of the Supreme Court of South Dakota dated January 4, 1989, is reported at 434 N.W.2d 725 (S.D. 1989), and is reprinted in the Appendix hereto, A-1. This was the court's opinion issued on rehearing. The earlier opinion of the South Dakota Supreme Court was dated April 20, 1988, and is reported at 422 N.W.2d 425. This opinion is set forth in the Appendix at A-38.

The Memorandum Opinion of the Circuit Court for the Third Judicial Circuit, Codington County, South Dakota issued on March 4, 1987, is unreported. This opinion is reprinted in the Appendix at A-85. The Findings of Fact and Conclusions of Law of the circuit court were not reported, but are reprinted in the Appendix at A-105. The

judgment of the circuit court entered March 19, 1987, is set forth at A-111.

JURISDICTION

This matter arose as an action for habeas corpus relief pursuant to S.D. Codified Laws Ann. ch. 21-27 (1987). Respondent alleged that his conviction, for two counts of murder entered on May 10, 1974, was the result of a violation of his rights against self-incrimination secured to him by the Fifth Amendment to the United States Constitution. A-114. After a hearing on the petition, the Circuit Court for the Third Judicial Circuit, Codington County, South Dakota, on March 18, 1987 denied the Writ of Habeas Corpus. See App. A-105; A-111.

On March 24, 1987 Respondent filed an appeal to the Supreme Court of South Dakota. The court initially reversed and remanded, indicating, without a firm majority decision, that the habeas corpus court should either

rehear the matter, or grant a new trial. See App. A-38. The State petitioned the Court to grant a rehearing on the merits. The Court granted rehearing in the matter, and on January 4, 1989, the South Dakota Supreme Court entered a decision again reversing and remanding. The Supreme Court held that the habeas corpus court should reconsider application of the "fruit of the poisoned tree" doctrine, since the failure to give Miranda warnings rendered a statement to former Codington County Sheriff Berg involuntary. See App. at A-14 to A-15. This decision rested entirely upon federal constitutional grounds.

This Court's jurisdiction to review this civil case is invoked under 28 U.S.C. § 1254(1); 28 U.S.C. § 2101(c); and Rule 20.2 and 20.4 of the Rules of this Court.

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, amend. XIV, § 1:

> . . . [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment 5:

> . . . [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; . . .

## STATEMENT OF THE CASE

References in this matter to Respondent's trial transcript will be made by

the letters TT followed by the applicable page number; references to the habeas corpus transcript will be HCT followed by the appropriate page number. Reference will also be made to the Appendix if contained therein.

On the morning of August 20, 1972, Respondent Steven Alan Satter, at the time a professional burglar, TT 166; A-198 to A-199, entered a trailer house near Pelican Lake in Codington County, South Dakota, and shot and killed Kent Engle and Jerry Bowling. TT 175; A-212 to A-213; TT 195; A-242.

After killing Engle and Bowling, Respondent disposed of their bodies in a rock pile along an abandoned railroad track south of Kranzburg, South Dakota. TT 181-182; A-221 to A-222. Later, Respondent told two friends, Don Waba, Jr. and Rick Schmelling, that he had committed the murders, and he took Schmelling to view the bodies. TT 125, TT 201; A-252.

On March 1, 1973, Respondent's probation officer took him into custody for a probation violation. HCT 6; A-278 to A-279. Respondent met with his attorney, William Hackett, at the Codington County Jail, on March 3, 1973, and was visited by Mr. Hackett periodically during the month of March. HCT 8-9; A-280 to A-281.

Throughout March, law enforcement officers questioned Respondent on numerous occasions about burglaries in the area. HCT 10; A-283. On each such occasion, Respondent was informed of all his rights as required by Miranda v. Arizona, 384 U.S. 436 (1966). Although he did not recall the exact number of times he was informed of his rights, Respondent knew it to be more than five. HCT 33; A-295. Most of the law enforcement officers with whom he spoke in March 1973 read him his rights. HCT 12; A-284 to A-285. He admitted that in March he

talked to five local law enforcement persons and ten to fifteen out-of-state law enforcement officers that month. HCT 32; A-293.

At Respondent's trial, Curtis Berg, then Sheriff of Codington County, South Dakota, testified that on April 1, 1973, he received a call at home from a man who stated that Berg was not looking successfully for the bodies buried south of Kranzburg. TT 71; A-139. The caller then described where the bodies were buried, and told Berg that if the Sheriff needed more information he should go to the jail and question Respondent. TT 71; A-140.

Berg went to look for the bodies, but was unsuccessful. TT 72; A-140 to A-141. He went back to the Codington County Jail and questioned Respondent about some of the burglaries in the area. TT 72; A-141. Berg testified that he did not inform Respondent

of his rights pursuant to Miranda v. Arizona, supra, before or during this interview.

Berg then asked Respondent if he knew anything about two bodies that were supposed to be buried somewhere around the Watertown area. TT 72; A-142. Respondent did not answer yes or no to the Sheriff's question, but asked what criminal offense he could be charged with if in a hypothetical case Respondent had been paid $1,000 to destroy two bodies that had been buried. The Sheriff told Respondent that he could possibly be charged as an accessory. TT 76; A-148. No further discussion about the bodies occurred at this time, and Petitioner never requested an attorney or that the interview cease. The conversation went on to other subjects.

Later in the same conversation, Respondent voluntarily returned to the subject of the bodies. He told Berg that a man named Amilio Deluci of Minneapolis,

Minnesota, had come to Watertown to collect his share of the proceeds from a burglary committed by Jerry Bowling and another man. TT 77, 78; A-150. According to Respondent, Deluci, finding that the two men had spent his share of the burglary proceeds, killed them and offered Respondent $1,000 to burn up their bodies with a cutting torch. TT 78; A-151. Respondent stated that he could not bring himself to do it because of the smell, and he gave the sheriff directions to locate the bodies. TT 78, 79; A-151 to A-152. Berg, following these directions, located the bodies of Bowling and Engle buried in the rock pile south of Kranzburg. TT 79-80; A-154 to A-155.

On April 4, 1973, Division of Criminal Investigation Agent Delbert Peterson came to Watertown, South Dakota, to investigate the murders. TT 100; A-162. Peterson interviewed Respondent twice after fully

advising him of his rights pursuant to Miranda v. Arizona, supra. Respondent, at this time, fabricated another story about a man named Pianto who had killed the two men. TT 104-105; A-167 to A-168. At no time during these interviews did Respondent request the presence of an attorney, or that the interviews cease.

During the months of March and April, Respondent was given at least six polygraph examinations. HCT 49, 51; A-307; A-309 to A-310. He received Miranda warnings before each such test. He failed all of these polygraph examinations relating to this crime. HCT 50; A-308.

On April 11, 1973, Agent Peterson again transported Respondent to Sioux Falls, South Dakota for yet another polygraph examination. Respondent was once again informed of his rights pursuant to Miranda v. Arizona, and once again failed the polygraph examination.

Respondent, after failing the examination, decided to tell the law enforcement officers a more truthful version of the killings for the first time. TT 107; A-170 to A-171; TT 204; A-255; TT 216; A-274 to A-275; HCT 18; A-289 to A-291. Having failed the polygraph examination on all prior versions of his story, Respondent nonetheless requested that he be allowed to take an additional polygraph examination before his trial. See App. 12 at A-126; App. 13 at A-131, statement, second to last paragraph. Before giving this oral statement Respondent was again advised of his Miranda rights. The written statement was drafted after an oral interview with Agent Peterson. On the following day, April 12, 1973, (after Respondent again received Miranda warnings) the written statement was retyped and resigned to eliminate typographical errors. HCT 30; TT 189, 190; A-232 to A-234.

Respondent's claim, at the time of trial, was self-defense. Id. Respondent never denied, after April 11, 1973, that he had shot Engle and Bowling. See App. 12 at A-126, written statement of Respondent Satter, April 11, 1973; TT 216; A-275.

During the months of March and April, 1973, after being informed of his rights on at least ten occasions, Respondent gave law enforcement officers a great deal of false information about other crimes, and led them on several "wild goose chases." TT 121-122; A-195. Respondent had hoped that by giving information, albeit false, about other major crimes, he could somehow "beat the rap" by dealing himself out of a burglary charge in exchange for information. TT 203; A-255; TT 212-213; A-267 to A-271. He freely admitted changing his story often in hopes of finding a story that would be believed, and would hold up after a polygraph examination.

See HCT 46-47; A-302 to A-304; HCT 48-50; A-305 to A-310.

Respondent was convicted of burglary or grand theft four times between 1967 and 1974. TT 166-167; A-198 to A-200; TT 185; A-227; TT 187; A-229 to A-230. He admitted committing at least forty burglaries in South Dakota and Minnesota immediately prior to the murders. TT 185; A-227. Respondent was a career criminal familiar with the criminal justice system. App. 19 at A-370.

In 1978, Respondent escaped from the South Dakota State Penitentiary and threatened to seek revenge against those who investigated this crime and their families. See Affidavits In Support of State's Stay Motion, App. 19 at A-370. He was captured and continues to serve his life sentences for the murders of Jerry Bowling and Kent Engle.

The issues sought to be raised were presented by Respondent in his application in

South Dakota Circuit Court. App. 8 at A-114. The Petitioner denied the grounds for relief in his Return to Writ. App. 10 at A-121. The Circuit Court passed on these grounds and denied relief. App. 4 at A-99 to A-102 and App. 6 at A-108 to A-109. In the South Dakota Supreme Court, Petitioner presented the issues sought to be raised in three separate briefs, as required by South Dakota Procedure. App. 17 at A-328 to A-333; App. 18 at A-341 to A-349; App. 19 at A-365 to A-369. The South Dakota Supreme Court found that since the initial statements (not now at issue) were improperly admitted, a remand was necessary to determine whether the Elstad-type statements were admissible. App. 1 at A-13 to A-15. This ruling was made even though there was a finding that all statements were voluntary, App. 6 at A-108, which was unreversed by the South Dakota Supreme Court. App. 1.

## REASONS FOR GRANTING THE WRIT

### I

THE DECISION TO REMAND FOR RECONSIDERATION IN LIGHT OF THE "FRUIT OF THE POISONOUS TREE" DOCTRINE DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN OREGON V. ELSTAD, 470 U.S. 298 (1985); AND IT ALSO CONFLICTS DIRECTLY WITH THE DECISIONS OF SEVERAL CIRCUITS AND OF SEVERAL STATE COURTS.

A. Introduction.

This case raises the issue of whether a subsequent, fully warned statement, taken pursuant to Miranda v. Arizona, 384 U.S. 436 (1966) is rendered inadmissible because a previous statement, found to be entirely voluntary, was not preceded by Miranda warnings. This Court addressed this issue in Oregon v. Elstad, 470 U.S. 298 (1985), and held that where the second statement was preceded by Miranda warnings, the mere existence of the first, unwarned statement was not itself sufficient to trigger suppression of the second statement. The

Petitioner contends that in spite of the clear holding of Elstad, the South Dakota Supreme Court, in this case, improperly held that subsequent statements could be excluded merely because earlier statements were given without the benefit of Miranda warnings.

The habeas corpus court specifically held that all of Respondent's statements to law enforcement officials were voluntary. App. 6 at A-108. Only the April 1 statements to Sheriff Berg were unwarned. Admission of the statements given without benefit of Miranda warnings was improper. The rule announced in Elstad, however, permits admission of subsequent statements given after Miranda warnings, where all preceding statements are voluntary.

B. Admission of Subsequent, Voluntary Statements After Having Taken a Prior Statement Without Benefit of Miranda Warnings.

In Oregon v. Elstad, supra, this Court found statements by a criminal defendant admissible, where the statements were preceded by Miranda warnings, even though the Defendant made a previous statement while in custody without the benefit of the Miranda warning. In Elstad, the defendant told the police, while in custody, with regard to a burglary, "I was there." The statement was apparently made during the first contact between the police and the defendant. The State of Oregon conceded that the interrogation was custodial and not preceded by Miranda warnings. 470 U.S. at 302.

This Court began its discussion of the case by indicating that prior to Miranda, the admissibility of a statement made by an accused while in custody was judged solely by whether the statement was voluntary within the meaning of the due process clause. Elstad, supra, at 304. The Miranda

precedent, however, excluded many confessions and statements that would have been admissible under the "old due process standard." Elstad, supra, at 305.

The Court in Elstad explained that the Fifth Amendment prohibits the State from using compelled testimony in its case in chief. Statements given without benefit of the Miranda warning are subject to a presumption of compulsion. Thus, even statements that are voluntary in the traditional "due process sense" of the Fifth Amendment must be excluded if not preceded by warnings.

This Court held, however, that it was an unwarranted extension of Miranda to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a

subsequent voluntary and informed waiver is ineffective for some indeterminate period. Id. at 309.

Therefore, the Court concluded that even though Elstad's initial statement "I was there" may well have led to the subsequent confession that Elstad gave the police after Miranda warnings were administered, the "fruit of the poisonous tree" doctrine did not require the suppression of the later statement.

This Court, reaffirming the Miranda precedent, held that the unwarned admissions must be suppressed. The same was not true, however, for fruits of the unwarned admissions, where both the prior and the subsequent statements were voluntarily given.

The Court stated that although "[M]iranda requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement

should turn in these circumstances solely on whether it is knowingly and voluntarily made". Elstad, supra at 309. The finder of fact making this inquiry should evaluate the circumstances and the police conduct regarding the subsequent statement. Elstad, supra at 318.

This Court also stated that where a prior statement is taken in such a manner as to render it involuntary under the due process clause, the "fruit of the poisonous tree" doctrine would be applicable. The Court would, under such circumstances, be required to analyze the time that passed between the confessions, the change in place of interrogation, the change of the identity of interrogators, and all other factors that would bear upon whether the subsequent mirandized statement was tainted by the prior statement. Such an extended analysis was not required, however, where the initial

statement was not involuntary. Elstad at 310-312.

The Court emphasized that there is a vast difference between statements taken without benefit of Miranda warnings and those coerced in violation of principles of due process. Failure to administer Miranda warnings does not mean that the statements taken without them have been actually coerced, but only that the courts will presume that the privilege against compulsory self-incrimination has not been intelligently exercised. Oregon v. Elstad, supra, at 310. Even prior to Elstad, the majority of courts explicitly or implicitly recognized that no break in the stream of events was required for admission of the second, warned statements. Id. at 310-311, n.2. A careful and thorough administration of the Miranda warnings serves to cure the condition that rendered the unwarned statement inadmissible.

Id. at 310-311. The warning conveys the relevant information and thereafter the suspect's choice, whether to exercise his privilege to remain silent, should ordinarily be viewed as an act of free will, Id. at 311, citing Wong Sun v. United States, 371 U.S. 471 at 486 (1963).

The Petitioner contends that this holding is plain and unequivocal. The lower courts have applied the Elstad decision in numerous factual situations where subsequent, warned statements were admitted,[1] even though

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[1] United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987); Bryant v. Vose, 785 F.2d 364, 366-367 (1st Cir. 1986); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984) (pre-Elstad); Kight v. State, 512 So. 2d 922 (Fl. 1987), cert. denied, 108 S.Ct. 1100 (1988); Bush v. State, 523 So. 2d 538, 557 (Ala. Crim. App. 1988). Several cases have held fairly directly that the fruits of any statements obtained through a non-coercive Miranda violation may be admitted, in spite of the Miranda violation. United States v.

(Footnote Continued)

there was an earlier unwarned statement. The

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(Footnote Continued)
Galberth, 846 F.2d 983 (5th Cir. 1988); United States v. Benguivenga, 845 F.2d 593, 600 (5th Cir. 1988); United States v. Cherry, 794 F.2d 201, 206 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); prior opinions, 759 F.2d 1196, 1208-1210 (1985); 733 F.2d 1124 (1984) (physical evidence discovered through Miranda violation admissible); Stawicki v. Israel, 778 F.2d 380, 382 (7th Cir. 1985), cert. denied, 107 S.Ct. 150 (1986).

See also United States v. Richmann, 860 F.2d 837, 840-841 (8th Cir. 1988) (alternative holding; defendant not in custody); United States v. Galberth, 846 F.2d 983, 992-994 (5th Cir. 1988) (physical evidence; no custody); United States v. Bengivenga, 845 F.2d 593 (5th Cir. 1988); United States v. Waunecka, 842 F.2d 1083, 1087-1088 (9th Cir. 1988); earlier opinion, 770 F.2d 1434 (1985) (unwarned statements held voluntary, therefore post-warning statements admissible); United States v. Gentry, 839 F.2d 1065, 1074 (5th Cir. 1988) (same); United States v. Lewis, 833 F.2d 1380, 1386 (9th Cir. 1987); United States v. Johnson, 816 F.2d 918, 922-923 (3d Cir. 1987); United States v. Hall, 805 F.2d 1410 (10th Cir. 1986); United States v. Cherry, 794 F.2d 201, 207-208 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); United states v. Cervantes-Gaitan, 792 F.2d 770, 773 (9th Cir.
(Footnote Continued)

South Dakota Supreme Court, and a few other courts[2] have refused to apply this holding. Thus, a conflict has been created, requiring resolution by this Court.

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(Footnote Continued)
1986); United States v. Morales, 788 F.2d 833 (2d Cir. 1986) (arrest based on non-Miranda statement's fruits is not unconstitutional); State v. Stuck, 154 Ariz. 16, 739 P.2d 1333, 1336-1337 (1987); Cowan v. United States, 547 A.2d 1011 (D.C. App. 1988); Perry v. State, 522 So. 2d 817, 819-820 (Fla. 1988); Caplinger v. State, 185 Ga. App. 476, 364 S.E.2d 610; People v. Shuff, 158 Ill. App. 3d 157, 110 Ill. Dec. 274, 510 N.E.2d 1305 (Ill. App. 1987); State v. Tinkham, 510 A.2d 520 (Me. 1986); In Re Owen F., 70 Md. App. 678, 523 A.2d 627, 631-632 (1987); Pruett v. Commonwealth, 232 Va. 266, 351 S.E.2d 1, 5-6 (1986), cert. denied, 107 S.Ct. 3220 (1987); reh'g denied, 108 S.Ct. 12 (1987). (Alternative holding; no custody also found.)

[2] Eagan v. Duckworth, 843 F.2d 1554, 1557-1558 (7th Cir. 1988); cert. granted, argument scheduled 3-29-89, 57 U.S.L.W. 3598 (1989); State v. Hoeplinger, 206 Conn. 278, 537 A.2d 1010 (1988); Caso v. State 524 So. 2d 422, (Fla.), cert. denied, 109 S.Ct. 422 (1988); State v. Berg, 112 N.J. 45, ___, 548 A.2d 846, 858-861 (1988); State v. Hartley, 103 N.J. 252, 511 A.2d 80, 95-99 (1986).

In the present case, the South Dakota Supreme Court found, among other things, that the admission of earlier, unwarned statements was not harmless error because of the "fruits" that the statements bore. At a minimum, this harmless error analysis is seriously flawed because of the South Dakota Supreme Court's refusal to apply Elstad and the other cases following it. In Elstad, supra at 305-306, this Court held that the fruits of a Miranda violation are not to be excluded absent an actual fifth amendment violation. Nearly all cases that have considered the matter have found that admission of an oral unwarned statement, which is less inculpatory than a subsequent, written, warned statement is harmless.[3] The

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[3]United States v. Johnson, 816 F.2d 918, 923 (3d Cir. 1987); Bryant v. Vose, 785 F.2d

(Footnote Continued)

issue has not, however, been decided by this Court, although it may be at issue in Duckworth v. Eagan, cert. granted, #88-317, 57 U.S.L.W. 3259 (1988), argued March 29, 1989.

C. South Dakota Supreme Court Analysis.

The South Dakota Supreme Court decision is in clear contravention of this Court's

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(Footnote Continued)
364, 366-367 (1st Cir. 1986); United States v. Packer, 730 F.2d 1151 (8th Cir. 1984) (pre-Elstad); Kight v. State, 512 So. 2d 922 (Fl. 1987), cert. denied, 108 S.Ct. 1100 (1988); Bush v. State, 523 So. 2d 538, 557 (Ala. Crim. App. 1988). Several cases have held fairly directly that the fruits of any statements obtained through a non-coercive Miranda violation may be admitted, in spite of the Miranda violation. United States v. Galberth, 846 F.2d 983 (5th Cir. 1988); United States v. Benquivenga, 845 F.2d 593, 600 (5th Cir. 1988); United States v. Cherry, 794 F.2d 201, 206 (5th Cir. 1986), cert. denied, 107 S.Ct. 932 (1987); prior opinions, 759 F.2d 1196, 1208-1210 (1985); 733 F.2d 1124 (1984) (physical evidence discovered through Miranda violation admissible); Stawicki v. Israel, 778 F.2d 380, 382 (7th Cir. 1985), cert. denied, 107 S.Ct. 150 (1986).

mandates in Elstad; Michigan v. Tucker, 417 U.S. 433 (1974); New York v. Quarles, 467 U.S. 649 (1983); Colorado v. Spring, 479 U.S. 564 (1987); and Colorado v. Connelly, 479 U.S. 157 (1986).

Initially, the South Dakota Supreme Court failed to recognize that a difference exists between an involuntary statement and one taken in violation of the dictates of Miranda. To the contrary, that Court specifically equated involuntariness with failure to administer Miranda warnings. App. 2 at A-13 to A-14. Yet the entire premise of the Elstad decision was that even though an initial, unwarned statement is excluded, subsequent statements, although flowing from that initial statement, are admissible if knowingly and voluntarily made.

Petitioner argued alternative positions to the South Dakota Supreme Court. First, Petitioner argued that it was not reversible

error to fail to mirandize Respondent because he was not in custody for the crime he was being questioned about, he was familiar with the legal system and had been repeatedly mirandized during the preceding month and further that his initial statement was not incriminating. App. 16 at A-323 to A-328; App. 17 at A-336 to A-341; App. 18 at A-352 to A-365. Alternately, the State argued that assuming that there was a presumption of compulsion created by the failure to mirandize, the holding in Oregon v. Elstad required that the subsequent mirandized statements were admissible if voluntary. App. 17 at A-328 to A-333; App. 18 at A-341 to A-349; App. 19 at A-365 to A-369.

The South Dakota Supreme Court rejected the Petitioner's contention that the initial unwarned statement was admissible on other grounds. App. 1 at A-10 to A-13. The Court found that a presumption of compulsion was

created, which would exclude the initial unwarned statement. The Court, however, then incorrectly equated this presumption of compulsion applied to the first statement with automatic involuntariness and exclusion of all subsequent warned confessions. A-13.

The South Dakota Supreme Court's decision did not find any due process involuntariness in the taking of the initial, unwarned statement. A-12 to A-14. The South Dakota Habeas Corpus Circuit Court specifically found that all statements were voluntary. A-108. The South Dakota Supreme Court did not reverse this finding, and based its holding entirely upon the failure to administer Miranda warnings before the initial statement. A-12 to A-14.

The South Dakota Supreme Court in its analysis sarcastically states, "the final premise that we deal with is that there were no deliberately coercive or improper tactics

used to warrant a presumption of compulsion. In other words, absent the use of the rubber hose, icy showers or marathon interrogations under bright lights, we should not presume that Satter's statements were involuntary." A-13. This quotation illustrates the failure of the Court to grasp the difference between a non-mirandized statement and an involuntary statement.

Since the factual findings of circuit court are clear, and the Supreme Court of South Dakota did not reverse them, this Court should apply the law clearly set forth in Elstad to the facts of this case, and reverse the South Dakota Supreme Court determination.

The Respondent recognizes that the South Dakota Supreme Court did not go the entire distance and require a new trial. Rather, it reversed for consideration of the "fruit of the poisoned tree" doctrine with regard to the second statements. Where a finding

already exists, however, that all statements are voluntary, and where this finding is unreversed, a remand is unnecessary and is contrary to the holding of Elstad, and the cases set forth in n.1 of this Petition. No extended analysis should be necessary to apply the Elstad holding. The facts relating to voluntariness have already been fully litigated and decided. As the initial statement was voluntary, although unwarned, Elstad requires that subsequent, warned, and voluntary statements are admissible. Elstad, supra, at 310-312.

D. Harmless Error Analysis.

The Petitioner acknowledges that the April 1, 1973, statements, which were voluntary but unwarned, were not admissible under Miranda, Elstad, or otherwise. Therefore, it is plain that Petitioner's first statement about a man named Amilio Deluci who had asked him to cut up the bodies

was improperly admitted at the Respondent's criminal trial in state court in May 1974. Respondent also told the sheriff at this time where Respondent had buried the bodies. The admission of such statements, however, is not necessarily reversible error. Chapman v. California, 386 U.S. 18 (1967); see also Delaware v. VanArsdall, 475 U.S. 673 (1986).

The South Dakota Supreme Court did recognize that it was required to engage in a harmless error analysis. App. 1 at A-12 to A-13. Analysis was flawed, however, by its unwarranted assumption, contrary to Elstad, that the "fruits" of the improperly admitted statement were themselves somehow tainted. Essentially, the South Dakota Supreme Court held that the admission of the initial statement was not harmless because the initial statements led to the bodies of the victims and to further statements by the Respondent. If, however, these "fruits" were

properly admissible, under Elstad, the South Dakota Supreme Court has not correctly analyzed the harmless error doctrine.

The effect of the error, whether harmless or prejudicial, must be calculated by weighing the effect of the introduction of the initial, unwarned statement on the jury. The effect of proper evidence should be to the benefit, not the detriment, of the State.

Petitioner contends that the first admission was merely a fabrication, and had little, if anything, to do with the Respondent's guilt. A-151 to A-155. In subsequent mirandized statements, however, Respondent admitted that he was the one who had pulled the trigger and killed the victims, although he claimed self-defense. App. 12 at A-126; App. 13 at A-131. Together with all other physical and testimonial evidence presented at trial, these subsequent confessions are more than sufficient to

render it highly unlikely that the initial statement had any prejudicial effect in Petitioner's trial. The South Dakota Supreme Court did not, however, reach this point, since it implicitly rejected as tainted all evidence that flowed from the initial statement. A-12 to A-13. This was, of course, improper under Elstad, supra. Since no proper harmless error analysis has been made, this Court should either undertake the analysis or reverse and remand for further consideration.

II

THIS CASE RAISES IMPORTANT ISSUES OF FEDERAL CONSTITUTIONAL LAW, WHICH HAVE NOT BEEN, BUT SHOULD BE, DETERMINED BY THIS COURT, PARTICULARLY WHERE THE SOUTH DAKOTA SUPREME COURT HAS EXTENDED THE MIRANDA EXCLUSIONARY RULE FAR BEYOND ITS PREVIOUS BOUNDS.

This case raises an important issue regarding the admissibility of voluntary statements and confessions of criminal

defendants. Of overriding significance is the fact that the Respondent knowingly and voluntarily made the subsequent, written statements after full and appropriate warnings as required by Miranda v. Arizona, supra.

In the present case, the South Dakota Supreme Court found that Satter's statements might be suppressed, even though they were given after full warnings, voluntarily, and without any claim of police misconduct or coercion. One of the primary reasons for suppression of unwarned statements is to discourage police coercion of statements. See Elstad, supra at 310-313; Miranda, supra at 449-455. This rationale is not even arguably furthered by suppression of the later, fully warned statements in this case.

In reality, the price of excluding Petitioner's confession is considerable. Elstad, supra at 304-305. In this case, for

example, a retrial would be required if the habeas court on remand were to find the subsequent statements excludable. The jury trial in this case was held over fifteen years ago. Witnesses have died. Memories have faded. In addition, if this case remains as precedent within the State of South Dakota, it is apparent that subsequent statements, even though given after full Miranda warnings, may be excluded simply because there was an earlier, voluntary but unwarned statement. Such a result is patently contrary to that in Oregon v. Elstad, supra.

Further, it is critical to note that the South Dakota Supreme Court's reasoning and holding are based entirely on the federal constitution and United States Supreme Court precedent. The South Dakota Supreme Court did not utilize the state constitution or laws to support its decision. This Court has

been careful to keep Miranda within its original bounds under the United States Constitution. See Fare v. Michael C., 442 U.S. 707 (1979); see also Oregon v. Elstad, supra; Colorado v. Spring, supra; Colorado v. Connelly, supra; Wyrick v. Fields, 459 U.S. 42 (1982); Fare v. Michael C., 439 U.S. 1310 (Rehnquist, J. in Chambers) (1978). The State should not be crippled in its law enforcement efforts by overly broad readings of Miranda and its progeny. Rather, this Court should accept certiorari in this case, and either permit full briefing and argument, or summarily reverse based on the clear precedent of Oregon v. Elstad, supra.

This is particularly so in light of Duckworth v. Eagan, no. 88-317, certiorari granted, 57 U.S.L.W. 3259 (October 11, 1988) presently pending for consideration by this Court. This case was argued March 29, 1989. 57 U.S.L.W. 3598 (March 14, 1989) (hearing

scheduled); see also 57 U.S.L.W. 3161 (September 20, 1988) (filed); 57 U.S.L.W. 3265 (October 11, 1988) (summary); 57 U.S.L.W. 3312 (November 1, 1988) (appointment of counsel). Eagan raises, in a somewhat different context, the same issue as presented in this case. In Eagan, a supposedly inadequate Miranda warning was given before the initial statement, but a constitutionally adequate Miranda warning was given before the second statement. The Seventh Circuit Court of Appeals remanded for consideration of admissibility of the second statement, while holding the first statement inadmissible. The State of Indiana and the Solicitor General asked this Court, in their briefs, to determine whether the second statement would be admissible, even if the initial Miranda warning was inadequate. This is the primary question raised by this petition. Should this Court determine in

Eagan that the second statement was admissible without a remand for further proceedings, that holding would clearly govern this petition. For this reason, the Court may wish to postpone consideration of this petition until after the Court rules in Eagan. If Eagan should clearly govern, it might be possible to dispose of this petition by reversing and remanding the case to the South Dakota Supreme Court for reconsideration in light of Eagan and Oregon v. Elstad, supra.

## CONCLUSION

The South Dakota Supreme Court in this case decided an issue contrary to this Court's mandate in Oregon v. Elstad, supra. If the South Dakota Supreme Court would have applied Elstad, it would not have remanded the case to the habeas corpus court for reconsideration of the admissibility of subsequent statements made knowingly and

voluntarily and with the benefit of Miranda warnings.

Respondent believes that the South Dakota Supreme Court has totally failed to understand the distinction between an involuntary statement and a statement given without Miranda warnings. This Court has, however, made a clear distinction between the two. Elstad, supra at 307.

In addition, the decision below would deprive South Dakota law enforcement authorities and finders of fact of an entire class of otherwise highly probative and appropriate evidence. This Court is already considering a very similar issue in the case of Duckworth v. Eagan, supra. For these reasons, the Respondent respectfully prays that a writ of certiorari issue to review the decision of the South Dakota Supreme Court in

this matter, and that upon such review, the decision be reversed.

Dated this 4th day of April, 1989.

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